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14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA

16 TONYA LEWIS-WILLIAMS, RAYMOND) **Case No. 3:22-cv-06119-WHA**
17 LOCKETT, BRADFORD MITCHELL,)
ROSALIND PARKER, RYAN RIVERA,)
18 SZU CHENG SUN,)
Plaintiffs,)
vs.)
21 SAN FRANCISCO BAY AREA RAPID)
TRANSIT DISTRICT, and DOES 1-100)
Defendants.)
24)
25)
26)
27)
28)

**BENCH BRIEF RE: UPCOMING
MOTION FOR JUDGMENT AS A
MATTER OF LAW OR, IN THE
ALTERNATIVE, FOR A NEW TRIAL
(FRCP 50, 59)**

**Trial Date: October 15, 2024
Time: 7:30 a.m.**

1 Pursuant to the Court's instruction, Defendant San Francisco Bay Area Rapid Transit
 2 District ("BART") files this bench brief to provisionally describe the bases of its upcoming
 3 Motion for Judgment as a Matter of Law or, in the Alternative, for a New Trial. BART's
 4 FRCP 50 motion was deemed brought and preserved prior to the jury's return of its Phase I
 5 verdict.

6 During Phase I, BART met its burden of proof that no Plaintiff could be reasonably
 7 accommodated without an undue hardship as a matter of law:

8 First, BART established that it made accommodation decisions based on public health
 9 guidance that vaccination was the most effective means to protect against transmission of SARS-
 10 CoV-2, and that other interventions increased the risk posed by COVID-19, then circulating in
 11 the Delta and Omicron variants, which caused the highest rates of infections and hospitalization
 12 during the entire pandemic. Under the controlling law, as stated in Jury Charge 20 (Dkt. 206-1),
 13 BART was not required to offer an accommodation that increased health or safety risk. The
 14 evidence was unrebutted that BART received, and acted on, public health guidance that
 15 permitting unvaccinated workers to continue to work in person would do just that.

16 BART also presented expert testimony from Dr. Joseph Lewnard, an infectious disease
 17 epidemiologist, and Nancy McClellan, an industrial hygienist. These witnesses seconded the
 18 public health guidance received by BART that permitting Plaintiffs to continue to work at its
 19 facilities while unvaccinated would have increased the health and safety risk for others present.

20 Faced with this evidence, Plaintiffs made no showing of contrary public health guidance
 21 and made a strategic decision not to call their opposition expert, epidemiologist Dr. Harvey
Risch, leaving BART's evidence unrebutted. On this record, there was no triable issue for the
 23 jury concerning whether BART met its burden to establish that, based on what was known and
 24 advised at the relevant time, in-person work could not be accommodated without imposing an
 25 undue hardship, specifically an increased health and safety risk for others.

26 Second, BART introduced evidence that Plaintiffs could not perform their essential job
 27 duties remotely. Rather, the jobs these Plaintiffs held had to be performed in person, meaning at
 28 a BART facility. Plaintiffs did not dispute this evidence.

1 BART thus established that Plaintiffs could not work in person without imposing an
 2 undue hardship and could not perform their essential job duties remotely. Plaintiffs sought to
 3 pivot late in trial to an argument that BART should have accommodated them through unpaid
 4 leave. The trial evidence established that during the relevant time period, October 2021 through
 5 February 2022, the employee vaccine requirement was understood to be a continuing condition
 6 of employment. In other words, BART did not know if, or when, the employee vaccine
 7 requirement would be repealed. Hence, any Plaintiff placed on unpaid leave as an
 8 accommodation to retain their employment without being vaccinated would have been on
 9 indefinite leave, meaning without a known or fixed end date. It is settled law, however, that
 10 indefinite leave is not a reasonable accommodation. *E.g., Makor v. Burlington N. Santa Fe Ry.*
 11 Co., 680 Fed. Appx. 542, 544 (9th Cir. 2017) (“Job-protected leave for a fixed period can be an
 12 accommodation, but indefinite leave is not reasonable as a matter of law.”) (applying California
 13 law under FEHA); *LeBarron v. Interstate Group, LLC*, 529 F. Supp. 3d 1163, 1172 (D. Nev.
 14 2021) (“[T]he ADA does not require an indefinite, lengthy, unpaid leave of absence especially
 15 when the employer does not know when the employee will be able to return to duty.” (internal
 16 quotation omitted)); *Wood v. Green*, 323 F.3d 1309, 1314 (11th Cir. 2003) (same). As a matter
 17 of law, BART was not required to provide a Plaintiff with an indefinite leave of absence so that
 18 they could retain their job without being vaccinated.

19 There was thus no evidentiary basis for a Phase I verdict for Plaintiffs. Unrebutted
 20 evidence established that no accommodation could be extended to permit Plaintiffs to work in
 21 person without imposing undue hardship (*i.e.*, increased health and safety risk). Unrebutted
 22 evidence also established that Plaintiffs could not perform their essential job duties remotely.
 23 And an indefinite leave of absence was not a reasonable accommodation as a matter of law.

24 BART will present the foregoing issues and other appropriate grounds under Rules 50
 25 and 59 in its forthcoming motion.

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1 Dated: October 21, 2024

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